DAYA ANIKA SDN BHD

v.

KUAN AH HOCK

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[CODE NO: S2-22-324-1997]
31 MARCH 1998

EVIDENCE: *Admissions - Letters written without prejudice - Whether privileged and inadmissible - Whether 'without prejudice' communications made in the course of negotiations for settlement - Whether only inadmissible in evidence of the negotiations attempted*

CIVIL PROCEDURE: *Summary judgment - Triable issues - Whether plaintiff's claim in alternative prayers gave rise to triable issues - Whether defendant's defence or affidavit-in-reply showed cause why leave to defend must be given*

This was the defendant's appeal against the decision of the Deputy Registrar allowing the plaintiff to enter summary judgment for the sum of RM1,014,132.15. The plaintiff's claim was founded on an admission of debt made by the defendant in a 'without prejudice' letter sent in reply to the plaintiff's letter of demand. The defendant contended, *inter alia*, that: (i) the 'without prejudice' letter was privileged and thus not admissible in evidence; and (ii) since the plaintiff had structured its claim in three alternative prayers, the plaintiff was unsure of its claims and therefore there were triable issues.

Held:

[1] The 'without prejudice' letter containing the defendant's admission was not made in the course of negotiations for settlement nor had the parties commenced any form of negotiation for settlement. The admission was made on the defendant's acceptance of the statement of accounts sent by the plaintiff together with the letter of demand which set out the various amounts due and owing. Therefore, as no negotiations were taking place, the 'without prejudice' veil ought to be lifted.

[2] The defendant's defence or affidavit-in-reply did not show cause why leave to defend must be given. It merely objected to the plaintiff seeking to base its claim on the admission made in the 'without prejudice' letter.

[3] One of the alternative prayers of the plaintiff was for a sum less the amount raised in the defence of set off by the defendant. The other alternative prayer was for another sum should the court decide not to

award the late payment interest as specified on the invoices and delivery orders. The price had been agreed upon and thus there only was, in effect, one claim. Hence, the presentation of alternative pleas by the plaintiff could not have given rise to triable issues.

[Appeal dismissed.]

Case(s) referred to:

Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd [1995] 2 MLJ 363 ***(refd)***

Cutts v. Head & Anor [1984] 1 All ER 597 ***(refd)***

Guinness Anchor Marketing Sdn Bhd v. Lim Seng Lee Mallal's Digest 1996 para 403 ***(dist)***

Jansa Enterprise Sdn Bhd v. Temenang Engineering Sdn Bhd [1994] 2 MLJ 353 ***(foll)***

Malayan Banking Bhd v. Foo See Moi [1981] 2 MLJ 17 ***(refd)***

Ngai Heng Book Binder Pte Ltd v. Syntax Computer [1988] 1 MLJ 205 ***(dist)***

Oh Kuang Liang v. Associated Wood Industry Sdn Bhd [1995] 2 CLJ 961 ***(refd)***

United Malayan Banking Corporation Berhad v. Palm & Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206 ***(refd)***

Wong Nget Thau & Anor v. Tay Choo Foo [1994] 4 CLJ 617 ***(cit)***

Woon Hoe Kan & Sons Sdn Bhd v. Bandar Raya Development Bhd [1974] 1 MLJ 24 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 14 r. 1, O. 27 r. 3

Other source(s) referred to:

The Law and Practice of Compromise, David Foskett, 2nd edn, p 111

For the plaintiff - WS Tan; M/s Tan Eng Choong & Co
For the defendant - Jayanthi Balaguru; M/s Chia, Ooi, Sun & Co

Reported by Alex KC Lee

JUDGMENT

RK Nathan J:

Fact

This is an appeal against the decision of the learned Deputy Registrar allowing the plaintiff to enter summary judgment for the sum of RM1,014,132.15 and interest at 1.5% per month on the overdue invoices.

The short facts are as alleged in the defendant's defence and written submission. The defendant purchases concrete from the plaintiff and in return the defendant supplies the plaintiff labour and sand. Each party was supposed to debit each other's account pertaining to these supplies and make payments for the rest.

In para. 6 of the plaintiff's affidavit in support of the application for summary judgment, the plaintiff stated that since 31 May 1997, the defendant was indebted to the plaintiff in the sum of RM1,456,753.57 and that the plaintiff's solicitors had sent a letter of demand dated 16 June 1997 demanding for the said sum. The letter of demand was exhibited to the affidavit as "YKC-2". The defendant's solicitors' reply dated 27 June 1997 to the plaintiff's solicitors' letter of demand forms the basis upon which the plaintiff is now seeking to enter summary judgment. It is noted that even though the basis of the application rests on the admission allegedly made in the reply, the plaintiff is not proceeding under O. 27 r. 3 of the Rules of the High Court 1980 (RHC) but under O. 14 r. 1 RHC. The defendant's solicitors' letter was marked "Without Prejudice" and it contains the following admission:

> Our client further informs us that since November 1995 to November 1996, your clients Daya Anika Sdn Bhd has been delivering concrete worth RM1,848,851.65. Our clients have made payments for RM616,289.50. As your clients have also been supplied by our client, there are debit notes amounting to RM218,430.00. This leaves an outstanding sum of RM1,014,132.15.

At p. 2 of the written submission of the defendant, the solicitors stated "there was another letter dated 27 June 1997 from the appellant/defendant's solicitors forwarded together with the 'Without Prejudice' letter denying all liabilities". However, this other letter of 27 June 1997 was never produced to the court. As such, the court cannot accept this submission or allegation.

Whether To Lift The "Without Prejudice" Veil Or Not

The submission of the defendant is that the "without prejudice" letter of 27 June 1997 is privileged and not admissible. She also submitted that a dispute was already present when the respondent/plaintiff's solicitors had sent the letter of demand dated 16 June 1997 to the appellant/defendant.

The law on the admissibility or otherwise of documents has been clearly laid down in several cases. The defendant had cited the case of *Wong Nget Thau & Anor v. Tay Choo Foo* [1994] 4 CLJ 617. Ian Chin J had in that case referred to the Federal Court decision of *Malayan Banking Bhd v. Foo See Moi* [1981] 2 MLJ 17 where Chang Min Tat FJ in delivering the judgment of the Federal Court held at p. 18 as follows:

> It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted. This is in order not to fetter but to enlarge the scope of negotiations, so that a solution acceptable to both sides can be more easily reached.

In *Oh Kuang Liang v. Associated Wood Industry Sdn Bhd* [1995] 2 CLJ 961 the learned judge after perusing various authorities summed up the law at pp 964 - 965 as follows:

> I am of the considered view that the 'without prejudice rule' applies generally to exclude all negotiations genuinely aimed at settlements. A prudent and competent solicitor will always be on guard and will always label any negotiating correspondence with the words 'without prejudice' - to make known and to make clear beyond doubt that in the event the negotiations fell through, they are not to be referred to at the subsequent trial. I think the correct approach to resolve the 'without prejudice rule' would be by balancing two different public interests, namely, the public interest in promoting settlements, on the one hand, and the public interest in full discovery between parties to litigate, on the other.

In *Cutts v. Head and Another* [1984] 1 AER 597 at 605, 606, the Court of Appeal discussed the "without prejudice rule" and stated it as follows:

> That the rule rests, at least in part, on public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged as far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course as much the failure to reply to an offer as an actual offer) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J, in *Scott Paper Co v. Drayton Paper Works Ltd* [1927] 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table. ... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.

Based on the law set out in the various cases, of which at least one, I am bound by, I find that the "without prejudice" letter containing the admission by the defendant's solicitors was not made in the course of negotiations for settlement nor had the parties commenced any form of negotiation for settlement. The admission was made on their acceptance of the statement of accounts sent by the plaintiff to the defendant together with the plaintiff's letter of demand which set out the various amounts due and owing as follows:

Total invoices	RM1,850,599.65
Less Credit Note	RM1,748.00
Total value of concrete sold and delivered to defendant	RM1,848,851.65

Less total payment by defendant	RM616,289.50
Balance of total value of concrete sold to defendant	RM1,232,562.15
Total late payment interest at the rate of 1.5% per month as at 31.5.97	RM224,191.42
Total sum owing by defendant to plaintiff	RM1,456,753.57

However, the defendant's solicitors did claim a sum of RM218,430 as being due to the defendants, hence leaving a sum of RM1,014,132.15 outstanding.

In *The Law and Practice of Compromise* by David Foskett, 2nd edn. (Sweet and Maxwell) at p. 111, the author did sound a warning as follows:

> Practitioners will be aware that many letters are headed 'without prejudice' with little thought having been given to whether or not this is appropriate. Quite often the 'without prejudice' label can be overcome because no negotiations are taking place.

That being the case, I find that the plaintiff is entitled to judgment for the sum of RM1,014,132.15 and the "without prejudice" veil ought to be lifted, as no negotiations were taking place.

Whether Alternative Pleas Deprive The Plaintiff Of Relief Under O. 14

The second point raised by the defendant in the appeal is that by structuring its claim in three alternative prayers, the plaintiff is unsure of its claims and therefore triable issues are present.

In *Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363 the Court of Appeal reiterated the principles of O. 14 proceedings as follows at 367:

> When an application is made for summary judgment under O. 14 supported by an affidavit which goes to show that there is no defence, the defendants must show cause why leave to defend must be given. This means the defendants must provide answers on oath which constitute evidence that they have a defence which is fit to be tried. Denials in a defence do not constitute evidence. They are challenges to the other side to show proof.

In its defence or affidavit in reply, the defendant did not show cause as required. It merely objected to the plaintiff seeking to base its claim on the admission made in the "without prejudice" letter. As the defendant had raised a defence

of set off on the amount of the debit notes issued by it to the plaintiff, the plaintiff has prayed in the alternative for a sum less that amount. There was also an alternative prayer for another sum should the court decide not to award the late payment interest on the invoiced amount. To my mind, the defendant's contention is misconceived. The two cases cited by the defendant do not assist the defendant. In *Ngai Heng Book Binder Pte Ltd v. Syntax Computer* [1988] 1 MLJ 205 there was a serious dispute on the specific amount due because there was no prior agreement on the charges for the colour separation and printing works. The defendants had asked for a breakdown of the plaintiffs' charges to show how much was for colour separation and how much was for printing. The plaintiffs refused to accede to the request saying that they were not obliged to draw their invoices in that manner. The learned judge refused to allow the plaintiffs to enter summary judgment, and rightly so, I should add. The learned judge accepted the submission of the defendant at p. 205 as follows:

> Counsel for the defendants submitted that if the price of goods sold or service rendered had not been agreed, then the law would imply that a reasonable price would be paid and that could only be determined at a proper trial - see para 1892 of Chitty on Contracts (24th Ed.).

Such is not the case here and hence the decision in that case is not at all relevant to this case. Likewise the case of *Guinness Anchor Marketing Sdn Bhd v. Lim Seng Lee* Mallal's Digest 1996 para. 403, where the plaintiff's statement of claim and the affidavits deposed in support of the claim showed many discrepancies in respect of the nature of the claim against the defendants. In the instant case, the price has been agreed upon and there is only in effect, one claim.

Therefore, I am unable to accept the defendant's contention that the mere presentation of alternative pleas by the plaintiff results in there being triable issues warranting the dismissal of the O. 14 application.

Late Payment Interest

The plaintiff claimed for late payment interest of 1.5% per month amounting to RM224,191.42 as at 31 May 1997, based on a note on the invoices and delivery orders. The note stated that "An interest of 1½% per month will be charged on all overdue accounts".

The plaintiff relied on *Jansa Enterprise Sdn Bhd v. Temenang Engineering Sdn Bhd* [1994] 2 MLJ 353. At 365, the learned judge held as follows:

> In respect of the claim of interest of 1.5% per month for overdue accounts by the plaintiff, the defendant cannot deny this claim as it had full knowledge of this as clearly indicated in the invoices submitted to it by the plaintiff and there was no protest of this claim at all when the invoices were presented to the defendant. I am therefore of the view that the plaintiff is entitled to claim such interest. It is similarly not a triable issue at all.

Another case relied on by the plaintiff is *Woon Hoe Kan & Sons Sdn Bhd v. Bandar Raya Development Bhd* [1974] 1 MLJ 24 where the Federal Court held that where there was evidence that the parties had agreed on the rate of interest, the order made by the court should be for payment at the agreed rate. The debit notes claiming interest at such rates were never challenged or disputed and therefore ought to be allowed.

The defendant, on the other hand, did not submit any authorities except to deny that late payment interest is due. Therefore, I also hold that this is not a triable issue and give judgment for interest at 1.5% per month on the undisputed sum of RM1,014,132.15.

Whether To Lift The Corporate Veil?

The defendant, whilst on the one hand denying that the sum of RM1,456,753.57 is due to the plaintiff, in the same breath, in para. 5 of its defence, states that the said sum ought to be deducted from the debt due from a company, Design Concrete Sdn Bhd allegedly belonging to the plaintiff. Further, at para. 8 of its defence, the defendant states that it had suffered losses due to the "actions of the plaintiff and/or the company belonging to the plaintiff". The defendant has in its submissions asked the court to lift the corporate veil as it alleges that Design Concrete is owned by the plaintiff. This the plaintiff has denied and by the defendant's own exhibit relating to the search made on the two companies, it can be seen that the shareholders of both the companies are not the same and that the plaintiff does not own Design Concrete. Furthermore, this relief was not sought in the defendant's counterclaim. As such, the defendant cannot pray for this relief now via its affidavit, or submissions. It has to specifically plead and pray for that relief in its counterclaim or defence before the court can consider it. The *dicta* of the Federal Court in *United Malayan Banking Corporation Berhad v. Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206 at 207 is of relevance. Furthermore, the defendant has failed to show that the justice of the case demands that the corporate veil be lifted. I therefore cannot accede to the defendant's request at this stage.

I therefore, dismiss this appeal with costs and affirm the decision of the Deputy Registrar dated 5 November 1997.